STATE OF MICHIGAN

COURT OF APPEALS

TIMOTHY PIERRON, Plaintiff-Appellant,	UNPUBLISHED January 27, 2011
v	No. 292817 Wayne Circuit Court Family Division
KELLY PIERRON, Defendant-Appellee.	LC No. 99-920324-DM

Before: SHAPIRO, P.J., and SAAD and DONOFRIO, JJ.

PER CURIAM.

This case has a long procedural history. It concerns a dispute over where the parties' children would attend school. The merits of the case were ultimately resolved by the Michigan Supreme Court. After remand from that Court, defendant brought a motion for attorney fees under MCR 3.206(C). Defendant sought $101,449.12 to cover fees to that date, including the appeals. Defendant also sought $60,000 in fees for subsequent proceedings. The trial court found that fees should be awarded under the rule, but declined to order the amounts requested by defendant despite the fact that the reasonableness of defense counsel's hourly rate was not disputed. Rather than the $161,449.12 sought by the defense, the trial court awarded a total of $89,599.12, $25,000 of which was for subsequent proceedings. Plaintiff appeals.

Plaintiff argues that defendant's motion for fees was barred by res judicata, collateral estoppel and the law of the case. Plaintiff also argues that the trial court erred by making findings of fact on the relevant issues without a full evidentiary hearing. We affirm the trial court's award of fees for litigation to the date of the award. We reverse the award of prospective fees and remand for further proceedings.

"In domestic relations cases, attorney fees are authorized by both statute, MCL 552.13, and court rule, MCR 3.206(C)." *Reed*, 265 Mich App at 164. However, "attorney fees are not recoverable as of right . . . . [and] may be awarded only when a party needs financial assistance to prosecute or defend the suit." *Id*. MCL 552.13 provides in pertinent part:

> (1) In every action brought, either for a divorce or for a separation, the court may require either party to pay . . . any sums necessary to enable the adverse party to carry on or defend the action, during its pendency. It may award costs against

> either party and award execution for the same, or it may direct such costs to be paid out of any property sequestered, or in the power of the court, or in the hands of a receiver.

MCR 3.206(C) provides:

> (1) A party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action or a specific proceeding, including a post-judgment proceeding.
>
> (2) A party who requests attorney fees and expenses must allege facts sufficient to show that
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> (a) the party is unable to bear the expense of the action, and that the other party is able to pay, or
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> (b) the attorney fees and expenses were incurred because the other party refused to comply with a previous court order, despite having the ability to comply.

As noted, plaintiff argues the trial court's award of attorney fees was barred by res judicata, collateral estoppel and/or the law of the case doctrine. The award of fees was made following remand proceedings after the Supreme Court's opinion. *Pierron v Pierron*, 486 Mich 81; 782 NW2d 480 (2010).

The issue of attorney fees for the initial trial court proceedings arose on two occasions during those proceedings.[1] At the close of the first evidentiary hearings in November 2007, the trial court issued its opinion from the bench and, after ruling on the merits, added that it found "no basis to award attorney fees to either party and each shall bear their own fees for this action." The written order granting plaintiff's motion, however, did not include this ruling.

On November 26, 2007, defendant filed a motion for reconsideration of the November 12, 2007, order, at which time she also asked for attorney fees pursuant to MCR 3.206(C)(2)(a). Specifically, defendant asked for "attorney fees to allow her to have the legal representation that she needs to accomplish the goals that the law and court rulings have demanded of her. Including steps necessary to acquire court permission to allow the minor children to attend the school district in their home area." The trial court rejected defendant's request for attorney fees "as they were improperly filed." The trial court explained:

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[1] The proceedings after remand were conducted by a different judge than the one that presided over the original proceedings.

> The Defendant's request was not made by motion as required, but made in the Defendant's Brief in Support of Motion for Reconsideration. Such requests must be made by motion and have supporting documentation and/or legal briefs. This is also necessary to permit the opposing party to respond, as they would not be allowed to do so within the realm of a motion for reconsideration . . . .

The trial court's order provided that the claim for attorney fees was dismissed *without prejudice*.[2]

Although the trial court did not order assessment of any fees either in its oral ruling from the bench or in its order denying defendant's motion for reconsideration, we conclude, for the reasons set forth below that these events did not foreclose a subsequent, properly filed request for attorney fees.

This Court reviews de novo the issue of "whether the doctrine of res judicata bars a subsequent action," *Begin v Mich Bell Tel Co*, 284 Mich App 581, 598; 773 NW2d 271 (2009), and "[w]hether a party's claim is collaterally estopped," *VanVorous v Burmeister*, 262 Mich App 467, 476; 687 NW2d 132 (2004). Similarly, "[w]hether and to what extent the [law of the case] doctrine applies is a question of law that this Court reviews de novo." *Kasben v Hoffman*, 278 Mich App 466, 470; 751 NW2d 520 (2008).

The doctrine of res judicata:

> . . . . bars a subsequent action between the same parties when the facts or evidence essential to the action is identical to that essential to a prior action. The purposes of res judicata are to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and encourage reliance on adjudication. Res judicata requires that (1) the prior action was decided on the merits, (2) the decree in the prior action was a final decision, (3) the matter contested in the second case was or could have been resolved in the first, and (4) both actions involved the same parties or their privies. The burden of establishing the applicability of res judicata is on the party asserting the doctrine. [*Richards v Tibaldi*, 272 Mich App 522, 530-531; 726 NW2d 770 (2006) (citations omitted).]

It is clear that the doctrine of res judicata is inapplicable here. The proceedings at which the request for fees was granted was not, as plaintiff asserts, a subsequent action, but a *continuation of the initial action*, following a remand from the Supreme Court. *Vandenberg v Vandenberg*, 253 Mich App 658, 663; 660 NW2d 341 (2002). As such, the doctrine of res judicata is not at issue.

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[2] Plaintiff's contention that the trial court inadvertently erred when it inserted the "dismissed without prejudice" language in reference to the attorney fee issue in the order denying defendant's motion for reconsideration is unsubstantiated.

We also affirm the award of fees for the appeal as against a res judicata challenge. The trial court's decision to award appellate attorney fees took place at a proceeding following the Supreme Court's remand order, "and is thus [also] part of a continuous action and not a separate lawsuit." *Vandenberg*, 253 Mich App at 663. Therefore, res judicata does not apply. Furthermore, as will be discussed further below, MCR 3.206 allows a party to request attorney fees "at any time," and "when adopting a court rule, our Supreme Court is presumed to be aware of the common law that may affected by the adoption." *Terra Energy, Ltd v State*, 241 Mich App 393, 401; 616 NW2d 691 (2000). Thus, the court rule prevails in any conflict with the doctrine of res judicata and defendant's request for attorney fees for the first appeal is not barred.

Plaintiff's reliance on collateral estoppel and law of the case present closer questions. Collateral estoppel "requires that (1) a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment, (2) the same parties had a full and fair opportunity to litigate the issue, and (3) there was mutuality of estoppel." *Estes v Titus*, 481 Mich 573, 585; 751 NW2d 493 (2008). In addition, "[a] question has not been actually litigated until put into issue by the pleadings, submitted to the trier of fact for a determination, and thereafter determined." *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 343 n 49; 657 NW2d 759 (2002), quoting *Vandeventer v Michigan Nat'l Bank*, 172 Mich App 456, 463; 432 NW2d 338 (1988)(emphasis removed).

Plaintiff's argument that the trial court's subsequent decision was barred by collateral estoppel fails on the fundamental requirement that for collateral estoppel to apply, there must be a prior decision on the merits, i.e., that the subsequent issue sought to be barred was previously litigated and decided by a court. *Cleary Trust v Edward-Marlah Muzyl Trust*, 262 Mich App 485, 509; 686 NW2d 770 (2004). This has not occurred here.[3] Although the trial court, at the close of evidentiary hearings stated that it found "no basis to award attorney fees to either party and each shall bear their own fees for this action[,]" it did *not* include this determination in its

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[3]Although plaintiff's statement of the issue speaks in terms of "collateral estoppel," he argues instead that defendant's request for attorney fees is an impermissible "collateral attack" on the trial court's previous denial of defendant's request for fees. Plaintiff cites *People v Howard*, 212 Mich App 366; 538 NW2d 44 (1995), a criminal case, which holds that "[c]ollateral attacks on the validity of a prior plea are not permitted where the defendant was represented by counsel." *Id.* at 370. Plaintiff relies on *Howard*'s definition of a collateral attack as "a challenge . . . made to a judgment in any manner other than through a direct appeal," *Id*. at 369, but the case does not in any way support plaintiff's claim that the request for attorney fees in what is essentially a continuation of the underlying proceeding after an initial remand from this Court is in fact a collateral attack, or that, in this case, it was impermissible. "[A]ppellants may not merely announce their position and leave it to this Court to discover and rationalize the basis for their claims; nor may they give issues cursory treatment with little or no citation of supporting authority." *McIntosh v McIntosh*, 282 Mich App 471, 485; 768 NW2d 325 (2009).

subsequent written order granting plaintiff's motion to keep the minor children enrolled in the Grosse Pointe Woods school district and thus we find that this issue was not, in fact, decided as of the trial court's initial order. See *Tiedman v Tiedman*, 400 Mich 571, 576; 255 NW2d 632 (1977) ("The rule is well established that courts speak through their judgments and decrees, not their oral statements or written opinions."); *Brausch v Brausch*, 283 Mich App 339, 353; 770 NW2d 77 (2009) ("It is well settled that a court only speaks through written judgments and orders."). And while defendant renewed her motion for attorney fees during her motion for reconsideration, and the trial court found this manner of raising the issue to be improper, it dismissed the claim for attorney fees without prejudice. "Generally, *a dismissal without prejudice*," which occurred in the case at bar, "*is not an adjudication on the merits*[.]" *Cleary Trust*, 262 Mich App at 509-510 (emphasis added). Further, this Court, albeit in connection with its incorrect determination concerning the timing of defendant's request for fees, specifically upheld the trial court's "*refusal to consider the merits* of defendant's request for attorney fees." *Pierron v Pierron*, 282 Mich App 222, 264; 765 NW2d 345 (2009), aff'd, remanded, 486 Mich 81 (2010). Thus, there has been no decision on the merits, and collateral estoppel does not bar defendant's claim for attorney fees for the pre-appeal hearings in 2007.

We also reject plaintiff's argument that the law of the case doctrine barred defendant's request for attorney fees for both the prior trial court and appellate proceedings because this Court determined that the trial court's refusal to award attorney fees was proper. Pursuant to the law of the case doctrine:

> [I]f an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same. The appellate court's decision likewise binds lower tribunals because the tribunal may not take action on remand that is inconsistent with the judgment of the appellate court. Thus, as a general rule, an appellate court's determination of an issue in a case binds lower tribunals on remand and the appellate court in subsequent appeals. [*Grievance Adm'r v Lopatin*, 462 Mich 235, 259-260; 612 NW2d 120 (2000) (internal citations and punctuation omitted).]

Contrary to plaintiff's assertion, this Court did not render a decision on the issue of attorney fees for either the pre-appeal proceedings or the first appeal (which was not raised by defendant), but rather, as noted, specifically upheld the trial court's "*refusal to consider the merits* of defendant's request for attorney fees." *Pierron*, 282 Mich App at 264 (emphasis added). Moreover, "*a trial court* has unrestricted discretion to review its previous decision," and the law of the case doctrine does not preclude a trial court from reversing its prior decision. *Prentis Family Found, Inc v Barbara Ann Karmanos Cancer Inst*, 266 Mich App 39, 52-53; 698 NW2d 900 (2005) (emphasis added). Therefore, the law of the case doctrine does not apply.

We are also not persuaded by plaintiff's argument that the trial court erroneously interpreted the "at any time" language of MCR 3.206(C). "The proper interpretation and application of a court rule is a question of law, which we review de novo." *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009).

As discussed above, MCR 3.206(C)(1), which addresses attorney fees and expenses in a domestic relations case, states: "A party may, *at any time*, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action or a specific proceeding, including a post-judgment proceeding." (Emphasis added.) An appellate court "uses the principles of statutory construction when interpreting a Michigan court rule." *Id.* at 495. Thus:

> Court rules are to be interpreted to give effect to the intent of the Supreme Court, the drafter of the rules. The starting point is the language of the court rule. If the language of the rule is clear and unambiguous, then no further judicial interpretation is required or allowed. Only when the language is ambiguous is judicial construction appropriate. A provision of the law is ambiguous only if it irreconcilably conflicts with another provision or when it is equally susceptible to more than a single meaning. If judicial construction is required, this Court must adopt a construction that best accomplishes the purpose of the court rule. While the Court may consider a variety of factors, it should always use common sense. [*Vyletel-Rivard v Rivard*, 286 Mich App 13, 21-22; 777 NW2d 722 (2009) (internal citations and punctuation omitted).]

Plaintiff argues that the trial court's interpretation of the "at any time" language of MCR 3.206(C) would produce an absurd result, in that a party could seek fees years after the entry of a final divorce judgment or after the conclusion of post-judgment proceedings. In other words, no judgment could ever be truly "final." Plaintiff asserts that public policy demands the finality of litigation in family law and concludes our Supreme Court most likely intended that the right be limited to "at any time" within the current proceedings. According to plaintiff, those proceedings conclude with the entry of an appealable order and the expiration of the time to file a timely appeal from that order. Thus, plaintiff contends that, when this Court denied fees to defendant and she failed to appeal that denial to the Supreme Court, the prior litigation was closed and plaintiff can no longer retroactively seek attorney fees for the prior trial or appellate proceedings.

We disagree, as "MCR 3.206(C) does not require that a request for attorney fees be made in a separate motion, and provides that a party may request attorney fees 'at any time.'" *Smith v Smith*, 278 Mich App 198, 207 n 3; 748 NW2d 258 (2008). Furthermore, regarding plaintiff's contention that the "at any time" language does not apply to litigation that is "closed," in the first appeal, this Court expressly remanded the case to the trial court to reconsider the issue of the minor children's school enrollment, and the Supreme Court affirmed this remand. Therefore, the trial court had jurisdiction to consider an award of attorney fees for both the 2007 hearings and the first appeal, pursuant to the "at any time" language of MCR 3.206(C)(1). *Avery v Demetropoulos*, 209 Mich App 500, 502; 531 NW2d 720 (1994).

Plaintiff next argues the trial court erred by not conducting a hearing regarding the reasonableness of the amount of the fees requested by defendant for her counsel's services for the prior stages of litigation, and for anticipated future litigation. On appeal, plaintiff does not dispute the hourly rate charged by defense counsel. However, he maintains that a hearing was nonetheless necessary because there were multiple factual issues that needed to be resolved concerning: (1) the lack of reasonableness of the alleged fees and litigation costs, (2) plaintiff's

inability to pay her own attorney fees and (3) what plaintiff describes as defendant's misconduct that resulted in some or all of the attorney fees incurred by both parties.

We are not persuaded by plaintiff's argument that a full evidentiary hearing was required.[4] In *Reed*, this Court found that the trial court erred "by not conducting a hearing *or finding facts* regarding the reasonableness of the fees incurred." *Reed*, 265 Mich App at 165 (emphasis added). The *Reed* Court explained:

> The party requesting attorney fees bears the burden of proving they were incurred, and that they are reasonable. When requested attorney fees are contested, it is incumbent on the trial court to conduct a hearing to determine what services were actually rendered, and the reasonableness of those services. The trial court may not award attorney fees, as apparently occurred here, solely on the basis of what it perceives to be fair or on equitable principles. [*Id*. at 165-166 (citations omitted).]

Furthermore:

> The trial court should consider the following nonexclusive list of factors when assessing the reasonableness of requested attorney fees: (1) the time and effort required, the novelty and difficulty of the issue involved, and the skill needed to perform the service properly; (2) the likelihood that acceptance of the case will preclude other employment for the attorney; (3) the fee customarily charged in the same locality for similar legal services; (4) the amount of money involved and the result obtained; (5) the time limitations imposed by the circumstances of the case or the client; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the attorney performing the service; and (8) whether the fee is fixed or contingent. [*Windemere Commons I Ass'n v O'Brien*, 269 Mich App 681, 683; 713 NW2d 814 (2006).]

In this case, although the trial court did not hold a full evidentiary hearing, it did conduct a hearing where the attorneys presented arguments regarding the reasonableness of the fees.

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[4] We review a lower court's determination regarding the necessity of an evidentiary hearing regarding the reasonableness of requested attorney fees for an abuse of discretion." *46th Circuit Trial Court v Crawford County*, 266 Mich App 150, 171-172 (2005); 702 NW2d 588 (2005), rev'd in part on other grounds 476 Mich 131 (2006). "We review a trial court's grant or denial of attorney fees for an abuse of discretion. Any findings of fact on which the trial court bases an award of attorney fees are reviewed for clear error, but questions of law are reviewed de novo." *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005)(citation omitted). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Radeljak v DaimlerChrysler Corp*, 475 Mich 598, 603; 719 NW2d 40 (2006).

Additionally, the trial court inquired into the parties' respective abilities to pay and addressed the issue of defendant's alleged misconduct. The trial court made findings of fact in its opinion based on this information, pursuant to *Reed*.

At the hearing, the trial court first inquired into plaintiff's ability to pay attorney fees when addressing plaintiff's motion to quash a subpoena for his bank records. The court stated:

> If [plaintiff] is claiming that he does not have the ability to pay attorney[] fees for [defendant], which is one of the issues that the court has to decide, then, you know, I have to think more carefully about the relevance of all that information. *If he's saying that's not an issue, then I quash the subpoenas*. That's why I'm asking the question. If he's conceding the point, that he does have the ability to pay, but still objecting to the payment for whatever other reasons, then [defendant is] not entitled to [the records]. [Emphasis added.]

Plaintiff's counsel gave an indirect answer, first stating that plaintiff "has paid every bill he's been required to pay," and then explaining, "all I'm saying is that based on the motions that have been filed for fees, two of them, I believe are irrelevant and should not even be before the Court," and, regarding the other motions for attorney fees, defendant's conduct had to be considered.

The court thus asked a second time, "[d]oes he have the ability to pay, 'yes' or 'no'? What's his position?" Plaintiff's attorney again gave a muddled answer:

> If the court ordered him, that he had to pay these fees, he would make a way to pay these fees. Does he have a lump sum payment of $200,000? No, he doesn't. But he has done everything the court has ever asked him to do. So I don't want to stand here and say that he can't follow through with the court order. He always has.

Concluding from these statements that plaintiff was not contesting his ability to pay, the judge granted plaintiff's motion to quash the subpoena. Thus, plaintiff's claim that the court should have held an evidentiary hearing to investigate his ability to pay defendant's attorney fees is without merit.

The trial court also inquired into the nature of the services rendered and the reasonableness of those services. *Reed*, 265 Mich App at 165-166. Defense counsel provided information on her rate ($200 an hour) and the hours worked for each of the phases of the litigation. First, the April 27, 2007 through November 26, 2007 time period which the trial court referred to as the "pre-appeal hearings." Second, the first appeal to this Court including activities from December 14, 2007, to April 23, 2009. Third, the fees incurred for answering the plaintiff's application for leave to appeal to the Supreme Court. The final category was the ongoing "hearings on remand." Defense counsel had been paid only $11,000 to date, the result of a loan to defendant from defendant's mother.

Plaintiff's attorney stated that plaintiff was represented by two attorneys from Miller Canfield, one of which billed at $220 an hour, the other $275. When both were in court, they

charged a "blended rate." From the beginning of the litigation in 2007 through the hearing on defendant's motions for attorney fees, plaintiff had paid $150,000 in attorney fees to Miller Canfield. Defendant had a third attorney to handle appeals, who charged somewhere between $200 and $250 an hour; and, up to that point, he had been paid $12,000, including $7,000 for the application for leave to appeal to the Supreme Court. When asked by the trial court if defendant's attorney's hourly rate of $200 an hour was reasonable, plaintiff's counsel said, "I do not dispute that," however, "the number of hours that have been spent on this case have . . . been exacerbated for my client . . . because of the manner in which this case has proceeded . . . ." Accordingly, the trial court properly noted in its opinion that plaintiff did not contest the reasonableness of the hourly rate requested. Therefore, plaintiff's claim that an evidentiary hearing was necessary to determine the reasonableness of the hourly rate charged by defendant's counsel is without merit. While plaintiff did dispute the number of hours claimed, the trial court in fact agreed, and reduced the award of fees for three out of the four time periods accordingly.

The court also inquired into the parties' respective financial situations. Defense counsel explained that defendant had worked part time at a restaurant for over a year, and the money that she earned, in addition to the child support she received from plaintiff, was enough to pay her bills, but not enough to also pay attorney fees. Defendant earned $10,500 in 2008 and received child support of $28,000. Defendant inherited $45,000 from her father that she used to purchase a house and appliances in 2007. However, defendant had been laid off from her job at the restaurant and now received unemployment of $144 a week. Defendant had since enrolled in the No Worker Left Behind Program and planned to go back to school for retraining. Defendant had no other income or assets. Defense counsel attached a statement to the motions detailing defendant's gross income and expenses.

Regarding plaintiff's income, tax returns for 2008 showed that he earned $298,000. According to plaintiff's attorney, he now had a new job with a base salary of $180,000 a year. Further, plaintiff's attorney stated that, when plaintiff testified at an earlier hearing that he made $300,000 a year, this figure included a discretionary bonus, the possibility of working weekend hours, medical insurance, disability insurance, and malpractice insurance. Plaintiff also had new medical insurance that did not cover his prescription medications, which cost $2,500 a month. Plaintiff had monthly expenses of $3,133.72 for child support, $2,100 for his mortgage, $600 a month for his 2008 Land Rover, $400 for gas, and $1,000 for food and clothing for himself and the children. In addition, he paid horseback riding lessons ($160 a month), and dance classes ($100 a month) for the parties' minor child. Plaintiff's counsel concluded that these expenses added up to $9,993 a month, whereas plaintiff had a net take home pay of $10,585 a month.

Based on this information, which included the parties' answers to the trial court's questions during the hearing, the trial court made findings of fact in its opinion regarding the parties' respective abilities to pay, in addition to its findings on the reasonableness of the fees requested, as discussed above. The court concluded that defendant did not have the ability to pay the fees requested, but plaintiff did. Given the information the parties provided to the court, the trial court did not abuse its discretion in awarding attorney fees without holding a separate evidentiary hearing because the record allowed it to make sufficient findings of facts. *Reed*, 265 Mich App at 165; *Kernen*, 252 Mich App at 691.

Regarding plaintiff's claim that the trial court failed to consider defendant's misconduct in violating the joint custody statue and the judgment of divorce, such a consideration is necessitated when the party asking for attorney fees pursuant to MCR 3.206(C)(2)(b), as provided above, is doing so because of the other party's misconduct. That is, consideration of defendant's misconduct would have been relevant had *plaintiff* been asking for attorney fees.

Regardless, in *Reed*, this Court found that "[t]he trial court abused its discretion by awarding attorney fees on the basis of defendant's unreasonable conduct without finding that defendant's misconduct caused plaintiff to incur the fees awarded." *Id*. at 165. While defendant's unilateral attempt to enroll the minor children in Howell public schools without plaintiff's consent was a violation of the joint custody statute and the judgment of divorce (i.e., a court order)[5], it did not change the minor children's established custodial environment. *Pierron v Pierron*, 282 Mich App at 248-249. Thus, because defendant did not violate the law by moving to Howell, *Id.* at 245-246, citing MCL 722.31(1), and the parties disagreed on the school issue, this matter would have been litigated and the fees incurred, regardless of whether defendant filed a motion to change the children's school before attempting to enroll them. Therefore, plaintiff cannot show that defendant's failure to comply with a court order caused him to incur fees. See *Reed*, 265 Mich App at 165 ("Although defendant's failure to comply with a discovery order constituted misconduct, plaintiff did not establish what fees she incurred as a result.")

Finally, plaintiff argues that the trial court erred in awarding prospective attorney fees for motions pending at the time of the fee order. While we do not determine whether prospective fees may be ordered in some cases, we agree that under the circumstances of this complex and lengthy case where plaintiff's counsel asserted at oral argument that plaintiff's income has substantially changed since the trial court's order, requiring plaintiff to pay prospective fees for proceedings which may or may not occur was error. Even if MCR 3.206(C)(2) is read to allow for prospective assessment of fees, given the contentious and continuing nature of this litigation we conclude that the trial court should impose fees only after they have been incurred. We therefore vacate that portion of the trial court's order directing that plaintiff pay $25,000 in

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[5] According to the judgment of divorce, "each parent shall have equal decision making authority with respect to matters concerning the children's health care, religious upbringing and *education.* Both parents shall be fully informed with respect to the children's progress in school and shall be entitled to participate in all school conferences, programs and other related activities in which parents are customarily involved. Both parents shall have full access to the children's school records, teachers, [and] counselors . . . ." Furthermore, "[a]n amended judgment of divorce, entered in June 2001, stated in relevant part that 'the Judgment of Divorce shall be amended to provide that the parties shall have joint legal custody and shared parenting time.'" *Pierron*, 282 Mich App at 226. Pursuant to MCL 722.26a(7)(b), a section of the joint custody statute, "parents shall share decision-making authority as to the important decisions affecting the welfare of the child."

prospective fees. However, the parties retain their rights to file a motion in the trial court for attorney fees incurred in this appeal and in trial court proceedings since the June 18, 2009 order.

Affirmed in part, reversed in part and remanded for further proceedings. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ Henry William Saad
/s/ Pat M. Donofrio